Cheong Heng Loong Goldsmiths (KL) Sdn Bhd v Chan Kim Swi (Capital Insurance Bhd, Garnishee)

HIGH COURT (KUALA LUMPUR) — SUIT NO C 2859 OF 1985
ARIFIN JAKA J
17 OCTOBER 1996

Civil Procedure *— Attachment — Garnishee order — Debt due from garnishee to judgment debtor — Whether liability of insurers under a policy was a debt which could be attached*

Evidence *— Privilege — Adjuster's report — Report prepared on the instruction of the solicitors of an insurance company and contained evidence necessary to prove the peril insured against under a policy — Whether report contained instructions from the insurance company to their solicitors — Whether report was privileged — Evidence Act 1950 ss 126–129*

Evidence *— Hearsay — Adjuster's report — Report was based on interviews with the insured, his colleagues and discussion with the police and not from his own personal knowledge — Persons interviewed in report were not called as witness during trial — Whether contents of report were hearsay and therefore not admissible*

Insurance *— Insured peril — Failure of insured to come forward to give information and evidence as to loss suffered — Whether non-compliance of condition precedent of policy — Whether insurer was liable to indemnify insured*

The second plaintiff ('the insured') took out a policy from the defendant ('the garnishee') under a jeweller's block policy ('the policy'). Under the policy, the garnishee agreed to insure and indemnify the insured against loss arising from any hold up or robbery of stock and merchandise of the insured's business. On 10 December 1984, a claim was submitted by the insured to the garnishee in respect of an alleged robbery.

On 20 August 1985, the first plaintiff ('the judgment creditor') obtained a judgment in default against the insured for a sum of money. The insured could not be traced. Thereafter, the judgment creditor took out garnishee proceedings and obtained an ex parte order attaching all debts due and accruing from the garnishee to the insured to answer the judgment recovered against the latter. The judgment creditor contended that the loss suffered by the insured was caused by a peril insured against, ie robbery and the garnishee was therefore liable under the policy. In order to prove that the insured had been robbed, the judgment creditor relied on a report by a firm of loss adjusters ('the report') concluding the results of its interviews with different parties alleged to be present at the time of the robbery. The garnishee claimed that the report was privileged and should not be produced. The main issue before the court was whether there was any debt due or accruing due from the garnishee and if so what amount.

Held, dismissing the plaintiffs' claim and discharging the garnishee order nisi:

(1) The report was not a communication between client and solicitor as to attract the protection of ss 126 to 129 of the Evidence Act 1950. It was merely a report which contained evidence which were necessary to prove robbery which was the peril insured against under the policy. The report contained the details of the investigation on the alleged robbery. It was necessary to produce the report since it was compiled to determine whether there was any robbery and whether any payment under the policy was bound to be paid (see p 197D–F); *Dato' Su Ba Chi & Ors v Koh Keng Kheng & Ors* [1989] 3 MLJ 445 distinguished.

(2) The contents of the report were based on interviews with the insured, his colleagues and discussion with the police and not from his own personal knowledge. None of the persons were called to give evidence to substantiate that robbery did take place. In conclusion, the contents of the report were hearsay and therefore not admissible.

Apart from the contents of the report, there was no other evidence to proved that there was a robbery. Therefore, taking into consideration all the facts and circumstances of the case, it may be concluded that the robbery was a fake and in fact there was no robbery, thus there was no debt due to the insured from the garnishee (see pp 197G–198C); *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corp* [1986] 2 MLJ 124 followed.

(3) In the present case, the failure of the insured to cooperate with the insurers and to come forward to give information and evidence as to the property lost or damaged as required by the insurers was a non-compliance with the condition precedent of the policy. Non-compliance of the terms in an insurance contract would put the insurer under no liability to indemnify the insured (see p 199F); *Directors of the London Guarantee Co v Benjamin Lister Fearly* Vol V—The Law Reports House of Lords 911 and *Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd* [1977] 1 MLJ 244 followed.

(4) It is trite that liability of the insurers under a policy is not a debt which could be attached. The order for attachment could only be made if the applicant successfuly establish that there is in law a debt due from the garnishee to the judgment debtor. In this case, there was no debt due to the insured from the garnishee (see pp 199I–200A); *Israelson v Dawson (Port of Manchester Insurance Co Ltd, Garnishee)* [1933] 1 KB 302 and *France v Piddington (Co-operative Insurance Society Ltd, Garnishee)* 43 Ll LR 491 followed.

A **[Bahasa Malaysia summary**

Plaintif kedua ('pengambil insurans') mengambil polisi daripada defendan ('yang digarnis') di bawah polisi tukang emas ('polisi tersebut'). Di bawah polisi tersebut, yang digarnis telah bersetuju untuk menginsurans dan menanggung rugi pengambil insurans
B daripada kerugian akibat apa-apa rompakan stok atau barang dagangan perniagaan pengambil insurans. Pada 10 Disember 1984, satu tuntutan telah diserahkan oleh pengambil insurans kepada yang digarnis berkaitan dengan satu rompakan yang dikatakan berlaku.

Pada 20 Ogos 1985, plaintif pertama ('pemiutang penghakiman')
C telah memperolehi penghakiman ingkar terhadap pengambil insurans untuk sejumlah wang. Pengambil insurans tidak dapat dikesan. Selepas itu, pemiutang penghakiman telah mengambil prosiding garnisan dan memperolehi perintah ex parte yang meletakkan semua hutang-hutang yang perlu dibayar dan terakru daripada yang digarnis kepada pengambil insurans untuk melangsaikan penghakiman yang diperolehi
D terhadap pengambil insurans. Pemiutang penghakiman menghujahkan bahawa kerugian yang ditanggung oleh pengambil insurans telah disebabkan oleh bahaya yang diinsuranskan, iaitu rompakan dan yang digarnis dengan itu bertanggunjawab di bawah polisi tersebut. Untuk membuktikan bahawa pengambil insurans telah dirompak,
E pemiutang penghakiman bergantung kepada satu laporan daripada firma pelaras kerugian ('laporan tersebut') yang menyimpulkan keputusan temubual dengan pihak-pihak yang berlainan yang dikatakan hadir pada masa rompakan. Yang digarnis mendakwa bahawa laporan tersebut adalah terlindung dan tidak boleh dizahirkan. Isu utama di hadapan mahkamah adalah sama ada terdapat apa-apa
F hutang yang perlu dibayar dan terakru daripada yang digarnis dan jika ada, berapakah jumlahnya.

Diputuskan, menolak tuntutan plaintif dan membatalkan perintah nisi garnisan:

G (1) Laporan tersebut bukanlah komunikasi antara anak guam dengan peguamnya yang boleh dilindungi oleh ss 126 hingga 129 Akta Keterangan 1950. Ia hanyalah laporan yang mengandungi keterangan yang diperlukan untuk membuktikan rompakan yang merupakan bahaya yang diinsuranskan di bawah polisi tersebut. Laporan tersebut mengandungi butir-butir siasatan pengataan
H rompakan tersebut. Adalah perlu untuk menunjukkan laporan tersebut kerana ia telah dikumpulkan untuk menentukan sama ada terdapat satu rompakan dan sama ada terdapat sebarang bayaran yang perlu dibuat di bawah polisi tersebut (lihat ms 197D–F); *Dato' Au Ba Chi* & *Ors* v *Koh Keng Kheng* & *Ors*
I [1989] 3 MLJ 445 dibeza.

(2) Kandungan laporan tersebut adalah berdasarkan kepada temubual dengan pengambil insurans, kawan-kawan sekerjanya dan perbincangan dengan pihak polis dan bukannya daripada pengetahuan peribadi. Orang-orang yang tersebut telah tidak dipanggil untuk memberikan keterangan bagi menyokong bahawa rompakan telah berlaku. Kesimpulannya, kandungan laporan tersebut hanya dengar cakap dan tidak boleh diterima.

Selain daripada kandungan laporan tersebut, tidak ada keterangan lain untuk membuktikan bahawa rompakan telah berlaku. Oleh itu, mengambil kira semua fakta dan keadaan kes, boleh disimpulkan bahawa rompakan itu adalah palsu dan pada hakikatnya tidak ada rompakan, oleh itu tiada hutang yang perlu dibayar kepada pengambil insurans daripada yang digarnis (lihat ms 197G–198C); *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corp* [1986] 2 MLJ 124.

(3) Dalam kes ini, kegagalan pengambil insurans untuk bekerjasama dengan penanggung insurans dan untuk memberi maklumat dan keterangan berkenaan dengan harta yang hilang atau rosak seperti yang dikehendaki oleh penanggung insurans merupakan ketidakpatuhan dengan syarat terdahulu polisi tersebut. Ketidakpatuhan kepada syarat-syarat di dalam kontrak insurans akan meletakkan penanggung insurans sebagai tiada liabiliti untuk menanggung rugi pengambil insurans (lihat ms 199F); *Directors of the London Guarantee Co v Benjamin Lister Fearly* Vol V—The Law Reports House of Lords 911 dan *Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd* [1977] 1 MLJ 244 diikut.

(4) Adalah mantap bahawa liabiliti penanggung insurans di bawah sesuatu polisi tidak boleh menjadi hutang yang boleh ditahan. Perintah untuk penahanan hanya boleh dibuat jika pemohon telah berjaya menunjukkan bahawa di sisi undang-undang terdapat hutang yang perlu dibayar oleh yang digarnis kepada penghutang penghakiman. Dalam kes ini, tiada hutang yang perlu dibayar kepada pengambil insurans daripada yang digarnis (lihat ms 199I–200A); *Israelson v Dawson (Port of Manchester Insurance Co Ltd, Garnishee)* [1933] 1 KB 302 dan *France v Piddington (Co-operative Insurance Society Ltd, Garnishee)* 43 Ll LR 491 diikut.]

Notes

For cases on garnishee order, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 743–746.

For cases on privilege, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1376–1400.

For cases on hearsay, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1004–1066.

For cases on insurance, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1–238.

Cases referred to

Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd [1977] 1 MLJ 244 (folld)

Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors [1989] 3 MLJ 445 (distd)

Directors of the London Guarantee Co v Benjamin Lister Fearley Vol V The Law Reports House of Lords 911 (folld)

France v Piddington (Co-operative Insurance Society Ltd, Garnishee) 43 Ll LR 491 (folld)

Israelson v Dawson (Port of Manchester Insurance Co Ltd, Garnishee) [1933] 1 KB 302 (folld)

Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corp [1986] 2 MLJ 124 (folld)

Legislation referred to

Evidence Act 1950 ss 126–129

Rules of the High Court 1980 O 49

Ranjit Singh, SY Lai, HK Lim and *YW Mah* (*SY Lai & Associates*) for the first plaintiff.

Normah Said (Public Trustee) for the second plaintiff.

Tunku Farik bin Tunku Ismail (*Azim Ong & Krishnan*) for the defendant.

Arifin Jaka J: This case concerns the liability of the defendant insurance company under a policy issued to one Chan Kim Swi and comes before me upon a garnishee issue.

The background of this case is that on 20 August 1985, Cheong Heng Loong Goldsmiths (KL) Sdn Bhd ('the judgment creditor') obtained judgment in default of appearance against Chan Kim Swi ('the judgment debtor') wherein it was adjudged that the judgment debtor do pay the judgment creditor the sum of RM555,362.97 together with interest thereon at the rate of 8%pa from 13 February 1985 to date of full realization and costs. Thereafter, the judgment creditor took out garnishee proceedings under O 49 of the Rules of the High Court 1980 and obtained from the senior assistant registrar the usual ex parte order dated 21 November 1985 attaching all debts due and accruing due from Capital Insurance Bhd ('the garnishee') to the judgment debtor to answer the judgment recovered against the judgment debtor by the judgment creditor and further ordering the garnishee to attend before the senior assistant registrar in chambers on 17 January 1986 at 9am and to show cause why they should not pay to the judgment creditor so much of the debt due from them to the judgment debtor as might be sufficient to satisfy the judgment together with costs of the garnishee proceedings.

The application to show cause was dismissed by the senior assistant registrar. On appeal by the judgment creditor to the judge in chambers against the dismissal of the application, Mahadev Shankar J (as he then was) on 6 July 1987 allowed the appeal and ordered, inter alia, as follows:

AND IT IS ORDERED that in accordance with O 49 r 5 of the Rules of the High Court 1980, the judgment creditor, Cheong Heng Loong Goldsmiths (KL) Sdn Bhd, and the garnishee, Capital Insurance Bhd, proceed to the trial of an issue wherein the said judgment creditor shall be plaintiff and the said garnishee shall be defendant and the question to be tried shall be whether there is any debt due or accruing due and if so what amount under the Jewellers Block Policy No 000104 JB/CKL/JH for RM600,000 dated on or about 16 October 1984 from the garnishee to the judgment debtor at the time the said garnishee order nisi was served AND IT IS FURTHER ORDERED that for the purpose of the trial of the issue aforesaid, the judgment creditor shall file and serve upon the garnishee aforesaid a statement of claim in the usual form within three weeks from the date of this order in which the judgment debtor shall be named as co-plaintiff AND IT IS ALSO ORDERED that the Public Trustee be and is hereby appointed to represent the interests of the judgment debtor upon being provided an indemnity by the judgment creditor as his costs and the garnishee shall file its statement of defence within three weeks from the date of service of the said statement of claim and the parties may take the usual summons for directions on close of pleadings.

Pursuant to this order, the parties duly filed the necessary pleadings. For the purpose of this judgment, the judgment creditor shall be referred hereinafter as the first plaintiff, the judgment debtor as the second plaintiff and the garnishee as the defendant.

The facts of this case are straightforward. It is agreed that a Jeweller's Block Policy No 000104 JB 84/CKL/JH dated 16 October 1984 ('the policy') was issued to the second plaintiff by the defendant for a consideration of the premium of RM25,802 paid by the second plaintiff to the defendant. Under the terms of the policy, the defendant agreed to insure and indemnify the second plaintiff against, inter alia, loss arising from any hold up or robbery of stock and merchandise of the second plaintiff's business and bank notes whether the same be the property of the second plaintiff or entrusted to him for any purpose whatsoever in the insured sum of RM600,000. It is also agreed that a claim form dated 10 December 1984 was submitted by the second plaintiff and that an adjuster, Thomas Howell Kiewit (M) Sdn Bhd, a firm of loss adjusters, duly submitted a report to the defendant in respect of the alleged robbery.

The issues to be determined by the court is whether there is any debt due or accruing due and if so what amount under the policy from the defendant to the second plaintiff at the time the garnishee order nisi was served. The garnishee order nisi was served on 28 December 1985 and this is the relevant date.

The first plaintiff's claim is based on the policy. It is their contention that the loss suffered by the second plaintiff was caused by a peril insured against, ie robbery and the defendant is therefore liable under the policy.

There is ample evidence to prove that the second plaintiff, the insured under the policy, could not be traced. The first plaintiff steps into the shoes of the insured thereby undertaking the onerous task of proving that the insured was robbed. The first plaintiff through their witnesses

A adduced evidence they had tried their very best to trace the insured. As early as in April 1986, they engaged the services of Malaysian Broadwide Investigation Agency & Adjusters Sdn Bhd, a private investigation company to trace the insured. A report was produced (P6). It concludes that:

> From our investigation, despite all reasonable efforts to trace 'subject' from
B available sources we have, we were satisfied that 'subject' could not be found or traced at all.

Again in 1995 another attempt to trace the insured was made and Amar Singh Gill (SP6) confirmed in his report (P10) that he was unable to trace the second plaintiff. To prove the robbery, the first plaintiff relied on a
C report (P9) prepared by Thomas Howell Kiewit (M) Sdn Bhd on the instruction of the solicitors for the defendant. The report with the heading 'Final Report on Armed Robbery Loss' was duly submitted by the said adjusters to the defendant.

The learned counsel for the defendant objected to the production of
D the report on the ground that it is privileged. After hearing argument of counsel for both parties and on a close scrutiny of the report, I am of the view that it is not a communication between client and solicitor as to attract the protection of ss 126–129 of the Evidence Act 1950.

The learned counsel for the defendant cited the case of *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors* [1989] 3 MLJ 445 as authority for the
E proposition that once a document has been given to the solicitors for legal advice, it is privileged. With respect, I do not agree with the learned counsel. In *Dato' Au*'s case, it was held that the document, being a document containing instruction from the defendants to their solicitors, is a privileged document and cannot be disclosed to any one except with the
F express consent given by each of the defendants. In the instant case, the report does not contain instructions from the defendant to their solicitors.

It is not an instruction from the defendants to their solicitors. It is merely a report which contains evidence which are necessary to prove robbery which is the peril insured against under the policy. In the interest
G of justice, I am of the opinion that it should be allowed to be produced for the purpose of determining whether there was a robbery as alleged by the second plaintiff. The report dated 24 April 1984 was compiled at the request of the defendant and contains details of the investigation on the alleged robbery of gold jewellery belonging to the second plaintiff, the goods that are insured under the policy. It is obvious to my mind that the
H investigation was necessary to determine whether there was a robbery to assist the defendant in determining whether they are bound to effect payment of the claim submitted on 10 December 1984 by the second plaintiff.

As I had stated earlier, the first plaintiff relied on this report to prove
I robbery. Although the report is admitted, it does not follow that its contents are admitted as a matter of course. If they are hearsay, they would be excluded, being not admissible. The report states:

> Following careful enquiries with the insured, his business associates and the police, we formed the opinion that the robbery was carefully planned by the

> robbers and know when and where to execute the robbery and they had also planned out the escape.

It is clear that the findings that 'there was a robbery that was carefully planned' is based on interviews with the insured, his colleagues who were with the insured at the time of the alleged robbery and discussions with the police and not from his own personal knowledge. None of the persons interviewed were called to give evidence to substantiate that the robbery did take place. For these reason, I rule that the evidence in respect of the robbery in the report is clearly hearsay. In *Malaysia National Insurance Sdn Bhd v Malaysia Rubber Development Corp* [1986] 2 MLJ 124, Lee Hun Hoe CJ (Borneo) had this to say on evidence derived from interviews at p 127:

> ... In our view, the material part of the evidence of DW1 was clearly hearsay evidence. His evidence was *derived from interviews* and not from his own knowledge. The learned judge was perfectly right to hold such evidence was hearsay. (Emphasis added.)

Besides the evidence that can be gathered in the report, there is no other evidence to prove that there was a robbery. The evidence of SP3 — the Area Inspector attached to Semenyih Police Station — does not help the first plaintiff at all. He carried out investigation from date of report to 1987 in connection with the police report (P8) lodged by the insured. He said that no arrest was made and the investigation was handed over to another officer, PPP Kamarudin, who was not called to give evidence. The evidence of SP3 did not conclusively say whether there was indeed a robbery. He said there was no result on the investigation.

I must also say that the circumstance surrounding the alleged robbery and the disappearance of the insured is suspicious. It is indeed strange that the insured lodged the report (P8) more than 24 hours after the robbery. If indeed there was a robbery, one would expect the insured to lodge the report immediately. The insured seems to have disappeared in thin air — nobody, not even his wife, knew his whereabouts. If it is true that he was robbed, there was no plausible reason that he should disappear and choose not to proceed with his claim against the defendant under the policy. To me, the only reason I can think of why he disappeared is to avoid paying what he owed the first plaintiff. He knew that it would be difficult for him to give particulars of his claim especially details of the robbery.

Taking into consideration all these facts and these circumstances, I am more inclined to conclude that the robbery was a fake and hold that there was no robbery. As a consequence, I find that there is no debt due to the second plaintiff from the defendants.

The defendants adduced evidence through their general manager, Mohd Khalid bin Abu Hassan. The evidence is brief and it established that after receiving the report from the adjuster (P9), the defendants were desirous of interviewing the insured but he could not be traced and that no payment was made to the insured because they were suspicious of the insured's involvement in the robbery. The evidence is unchallenged.

A It is further submitted by the learned counsel for the defendant that there is a condition precedent to the liability of the insurer which is stipulated in condition 6 of the policy which says:

> The assured shall in case of loss or damage and as a condition precedent to any right of indemnification in respect thereof give to the company such
B information and evidence as to the property lost or damaged and the circumstances of the loss or damage as the company may reasonably require and as may be in the assured's power.

In *Directors of the London Guarantee Co v Benjamin Lister Fearley* Vol V The Law Reports House of Lords 911, it was decided that non-compliance of
C the term in an insurance contract which is stipulated to be a condition precedent furnishes a good defence to an action instituted against the insurers.

In *Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd* [1977] 1 MLJ 244, it was decided, inter alia, by Ajaib Singh J (as he then was) that when a term in an insurance contract was stipulated to be a condition
D precedent to the liability of an insurer, the insurer was not liable under the policy unless the term has been strictly complied with by the insured.

The learned counsel for the first plaintiff argued that condition 6 is not a condition precedent but it is merely a condition precedent to give information and evidence as to the property lost. This contention is
E without merit as it is clear on reading condition 6 that it is a condition precedent. The learned counsel also contended that condition 6 was never pleaded. This too has no merit as the defendants in their defence denies liability and condition 6 is one of the grounds relied upon to deny liability and therefore it need not be pleaded.

F In the present case, the failure of the insured to cooperate with the insurers and to come forward to give information and evidence as to the property lost or damaged as required by the insurers to my mind is indeed a non-compliance with the condition precedent.

On the authority of *London Guarantee* and *Chong Kok Hwa*, I find
G that the insured did not comply strictly with the condition precedent and hold that the defendant is not liable under the policy.

The first plaintiff has also failed to adduce evidence as regards the amount due under the policy. The evidence on the quantum contained in the report (P9) is hearsay and therefore inadmissible on grounds which I had said earlier in this judgment.

H The second plaintiff was not present at the hearing. He was represented by the senior assistant public trustee who did not adduce any evidence to substantiate the claim. She did not submit and was in complete silence during the hearing. I hold that by her conduct, it can reasonably be implied that the insured was not proceeding with his claim.

I I now turn to consider the next issue, ie whether there is a debt to be garnished at the time when the garnishee order nisi was served on the insured second plaintiff. It is trite that the liability of the insurers under a policy is not a debt which could be attached. The order for attachment

could only be made if the applicant (the plaintiffs in this case) successfully establish that there is in law a debt due from the garnishee to the judgment debtor (see *Israelson v Dawson (Port of Manchester Insurance Co Ltd, Garnishee)* [1933] 1 KB 302; *France v Piddington (Co-operative Insurance Society Ltd, Garnishee)* Vol 43 Lloyd's Law List Reports 491).

In the instant case, in view of my finding that there is no debt due to the insured (the second plaintiff) from the garnishee (the defendant), I find favour for the defendant. I therefore dismissed both the plaintiffs' claim with costs and order that the garnishee order nisi be discharged.

Claim dismissed.

Reported by Zahid Taib